

1994

State of Utah v. Albert R. Jaramillo : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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UTAH COURT OF APPEALS
BRIEF

UTAH

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940494

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Respondent : Case No. 940494 CA
VS. :
ALBERT R. JARAMILLO : Priority No 2
Defendant/Appellant. :

BRIEF OF APPELLANT

Appeal of a denial of a Motion
to suppress Evidence
Obtained after a search pursuant
to a Warrant, where the Time of Issuance
was not Indicated on the Warrant,
and the Testimony is not clear Whether the
Search Occurred prior to or after the
Issuance of the Warrant

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FILED

JAN 20 1995

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
JURISDICTION AND NATURE OF PROCEEDINGS	1
STATUTES, RULES AND CONSTITUTIONAL PROVISIONS	2
STATEMENT OF ISSUES PRESENTED	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	5
<u>POINT I:</u> THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE FOUND IN DEFENDANT'S VEHICLE WHERE THE SEARCH WARRANT WAS NOT TIME DATED, AND THERE IS NO EVIDENCE THAT IT WAS ISSUED PRIOR TO THE SEARCH	5
CONCLUSION	8
CERTIFICATE OF MAILING	8
ADDENDUM	9

TABLE OF AUTHORITIES

<u>State v. Brooks</u>	
849 P 2d 640	2

STATUTES AND CONSTITUTIONAL SECTIONS

UCA 58-38-7	1, 2
UCA 59-19-106.	1, 2
UCA 77-23-1	6
UCA 77-23-2	5
UCA 78-2-2(3)(i)	1
Rule 26, Utah Rules of Criminal Procedure	1

IN THE UTAH COURT OF APPEALS

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JURISDICTION AND NATURE OF PROCEEDING

This appeal is from a denial of a motion to suppress evidence that was obtained by the police after a search and seizure of the Defendant's automobile after allegations that the police had obtained a search warrant. On the 18th of July, 1994 the Defendant, after a trial before a jury empaneled by the Honorable Michael J. Glasmann, was convicted of possession of a controlled substance, cocaine, with intent to distribute in violation of Section 58-37-8 UCA a second degree felony and failure to pay a drug tax in violation of Section 59-19-106 UCA, a third degree felony. On the 19th of July, 1994 the Defendant on Count I, Possession of a controlled substance with intent to distribute, was sentenced to serve terms of one to fifteen years and on Count II, Drug Tax Violation, zero to five years, all terms to run concurrent and to be served at the Utah State Prison. Jurisdiction to hear the above-entitled appeal is conferred upon the Utah Court of Appeals, pursuant to Utah Code annotated, 78-2-2(3)(i) (1953 as amended) and Rule 26 of the Utah

Rules of Criminal Procedure.

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW

1. Did the District Court abuse its discretion in refusing suppress evidence obtained by a search of the Defendant's motor vehicle under a search warrant that was not served upon the Defendant and the time of issuance was never stated on the search warrant.

Standard of Review The factual findings underlying the denial of a motion to suppress evidence is reviewed under a clearly erroneous standard and the trial courts conclusions of law is reviewed thereon for correctness. State v. Brooks 849 P 2d 640,643 (Utah App 1993)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Annotated Section 58-37-8, UCA.

(1) Prohibited acts A-Penalties

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally;

- (i) produce, manufacture, or dispense a controlled or counterfeit substance;
- (ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance.

Utah Code Annotated Section 59-19-106

(1) Any dealer violating this chapter is subject to a penalty of 100% of the tax in addition to the tax imposed by Section 59-19-103. The penalty shall be collected as part of the tax.

(2) In addition to the tax penalty imposed, a dealer distributing or possessing marihuana or controlled substances without affixing the appropriate stamps, labels or other indicia is guilty of a third degree felony.

(3) An information, indictment, or complaint may be filed upon any criminal offense under this chapter within six years after the commission of the offense.

This subsection supersedes any provisions to the contrary.

(4) Any tax and penalties assessed by the commission are presumed to be valid and correct. The burden is on the taxpayer to show their incorrectness or invalidity.

STATEMENT OF THE CASE

This is an appeal from a refusal of the Honorable Michael J. Glasmann to suppress evidence obtained from a search of the Defendant's vehicle. The issue is whether the search warrant was signed by the issuing magistrate before or after the search warrant was issued. The issuing magistrate did not remember the exact time of issuance of the search warrant to the Ogden City police officer and the warrant was not stamped as to the time of issuance. There was testimony that the officer told other participating officers that he had obtained a search warrant, but he did not show the warrant to any other person prior to the search of the vehicle.

FACTS

On the 14th of February, 1994, Ogden City Police Office, Mike Ashment, from an informer that there was a yellow Nova parked in the 2000 block of Adams Ave on the east side of the street facing north. The informant said that there was approximately one kilo of cocaine inside the car. (T. Pg's 6-7) Officer Ashment contacted his superior Sergeant Zimmerman and two other narcotics agents to assist him in the surveillance of the car. (T. P. 7)

All of the Officers met in the Ogden City cemetery. At approximately at 11:40 a blue sedan drove up and parked across

the street. At this point the Officers had been surveying the car for approximately two hours. (T. P 9)

After the initial surveillance began Sergeant Zimmerman went back to the Ogden City Police station to type up an affidavit for obtaining a search warrant of the yellow Nova, which was determined to be owned by the Defendant. (T. P. 52) Sergeant Zimmerman testified that he presented the affidavit to Judge Baldwin and it was signed at approximately 11:00 a.m. of the 14th of February, 1994. (T. p. 52, T. Suppression Hearing P. 18)

Judge Baldwin testified that he remembers vaguely the affidavit and that it was brought before him by Sergeant Zimmerman, but has no independent recollection as to the time it was signed. (T. Suppression Hearing P. 8) However, he could not dispute Officer Zimmerman's testimony that it was signed at 11:00 a.m. (T. Suppression Hearing P. 9)

Detective Ashment testified that Sergeant Zimmerman called him prior to 12:00 o'clock and told him that he had a search warrant signed. However, Sergeant Zimmerman never did show Detective Ashment the search warrant. (T. Suppression hearing P. 33) Deputy Lasater also testified that prior to 12:08 p.m. Sergeant Zimmerman called him and told him that he had a signed search warrant, but again was never shown the search warrant. (T Suppression hearing Pg's 48,50)

The yellow Nova began to be driven by the Defendant at approximately 12:15 p.m. and was stopped almost immediately after it was started. At that point it was searched, and the cocaine

was found in the Defendant's jacket located in the trunk of the vehicle. (T. P. 54)

SUMMARY OF ARGUMENT

The Trial Judge committed reversible error by refusing to suppress the evidence obtained after a supposedly warrant search of the Defendant's vehicle, where there was no evidence of whether the warrant was issued prior to the search of the vehicle.

ARGUMENT

THE TRIAL JUDGE COMMITTED REVERSIBLE
ERROR IN DENYING THE DEFENDANT'S
MOTION TO SUPPRESS EVIDENCE
FOUND IN DEFENDANT'S VEHICLE
WHERE THE SEARCH WARRANT WAS
NOT TIME DATED, AND THERE IS
NO EVIDENCE THAT IT WAS ISSUED
PRIOR TO THE SEARCH.

Section 77-23-2 UCA provides that property or evidence may be seized pursuant to a search warrant if there is probable cause to believe that its:

- (1) was unlawfully acquired or is unlawfully possessed:
- (2) has been used or is possessed for the purpose of being used to commit or conceal the commission of an offense; or
- (3) is evidence of illegal conduct.

Under Section 77-23-3 UCA a search warrant shall not issue except upon probable cause supported by oath or affirmation particularity describing the person or place to be searched and the person, property or evidence to be seized.

One of the considerations prior to the issuance of a search warrant is the protection against prior or direct restraints on

constitutionally protected rights. UCA 77-23-3(2)(a)

Under Section 77-23-1 UCA a search warrant is an order issued by a magistrate in the name of the state and directed to a peace officer, describing with particularity the thing, place or person to be searched and the property or evidence to be seized by him and brought before the magistrate.

Until the warrant is issued by the magistrate the police can not conduct a search in anticipation that a magistrate will issue a warrant at some time in the future. Until the informer called the police at approximately 8:00 a.m. on February 14, 1994 the police had no information that the Defendant might be engaged in criminal activity. Even with the information from the informer the police elected not to conduct a warrantless search of the Defendant's vehicle. But, rather, Sergeant Zimmerman returned to his office sometime after 8:30 a.m. and began to prepare the necessary affidavit to present to Judge Baldwin.

There is no question that the warrant was issued by Judge Baldwin, but the time of issuance is uncertain. Judge Baldwin testified that he was completely unsure of when he signed the search warrant. The warrant was dated, but the time of issuance was not indicated on the warrant.

The other testimony presented to the Trial Judge was the testimony of Sergeant Zimmerman, who testified it was issued at 11:00 a.m. (T. Suppression Hearing p. 20). This fact was based strictly on the memory of Sergeant Zimmerman, because he testified that he was the only officer who went into Judge

Baldwin's chambers to obtain the signature. (T. Suppression Hearing p. 20)

Other evidence was the testimony of Detective Ashment and Deputy Lasater, who both testified that Sergeant Zimmerman had called each of individually on the phone prior to the search and orally informed each that the warrant had been issued. (T. Suppression Hearing pg's 33,48)

However, it is significant that the signed search warrant, prior to the search, was not show to either police officer or to the Defendant. (T. Suppression Hearing p. 40)

The Trial Judge chose to believe the police officers in denying the Defendant's motion to suppress the evidence when he stated:

After hearing the testimony given by the agent-detectives that were involved in this case, it appears believable to the Court that the reason Zimmerman left after meeting with Ashment was to go and get a search warrant. And that the time frame that he described is about how long it would have taken him to prepare it and go get it signed.

And I think that it is also reasonable that what he did then is returned, after obtaining that, to then participate in the effecting of the search warrant. And again the tactical decision to wait until somebody got in the vehicle and participated in that. I believe from the testimony I have heard that even though, as you point out, it was probably an oversight it does not appear in the other reports-- I am not sure why that happened unless they were taking for granted that Zimmerman's report itself would contain all the information about what he did and the time he obtained the warrant and how that was done.

But in any event, on the balance of the evidence presented, I believe that the search warrant was obtained prior to this stop, and prior to the search being effectuated. And therefore I am going to deny your motion to suppress. (T. Suppression Hearing Pg's 60-61)

The only first hand testimony, as to the time of signing of the warrant was the testimony of Sergeant Zimmerman, one of the parties to the signing. The other party to the signing, the issuing magistrate had absolutely no recollection as to the exact time the warrant was signed. Sergeant Zimmerman under these circumstances obviously would testify that the warrant was signed prior to the search. But interesting, he did not elect to show the signed warrant either to the other participating officers or to the Defendant, either prior to or after the search.

Under these circumstances the Trial Judge committed reversible error in not granting the Defendant's motion to suppress the evidence obtained either prior to or after the warrant was issued.

CONCLUSION

The Trial Judge committed reversible error in not granting the Defendant's motion to suppress the evidence obtained from a search of his motor vehicle, because he could not find with certainty, based on the evidence produced at the suppression hearing that the warrant was signed prior to the search.

RESPECTFULLY SUBMITTED this 20 day of January, 1995


John T. Caine
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the above and foregoing Brief to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, postage prepaid this 20 day of January 1995.



John T. Caine
Attorney for Appellant

ADDENDUM

1 where I have worked for the last two years.

2 Q And how long were you a detective?

3 A About six years now.

4 Q And prior to that, what was your employment?

5 A Patrolman with the Ogden Police Department.

6 Q How long were you a patrolman?

7 A About a year and a half.

8 Q What training did you receive to become a police
9 officer?

10 A I graduated from the Utah Peace Officers Standards
11 and Training Academy. I was number one in my class. I earned
12 a bachelor of science degree from Weber State University in
13 the field of criminal justice. Throughout my career I have
14 received specialized training in various areas of law
15 enforcement, to include drug interdiction.

16 Q Talk for a moment about the specialized training in
17 drug interdiction. Could you describe what kind of training
18 you are talking about there?

19 A Yes, ma'am. I received two weeks of training from
20 the Utah Peace Officers Standards and Training Drug Academy,
21 basic training academy. I am a certified narcotics detector
22 dog handler for the State of Utah. And I also received
23 training in clandestine laboratory investigation.

24 Q How recent was your last training class?

25 A I believe it was about six months ago.

1 Q In your assignment with the Strike Force, could you
2 approximate how many investigations you have been involved in?

3 A During my involvement with the Strike Force or my
4 career?

5 Q During your involvement with the Strike Force.

6 A I would say probably somewhere in the area of 200.

7 Q Are all those investigations involving controlled
8 substances?

9 A Yes.

10 Q How frequently have you dealt with investigations of
11 persons either using, possessing or selling cocaine?

12 A Cocaine is one of the more popular drugs that we
13 seem to deal with. I have dealt with--are you asking me for a
14 number of cocaine investigations?

15 Q If you can give us a number.

16 A I couldn't give you an exact number.

17 Q All right, thank you. Now calling your attention to
18 February 14th of this year, did you receive some information
19 from an informant regarding a quantity of cocaine, and where
20 it might be located?

21 A Yes, I did.

22 Q What was the information that you received?

23 A I was contacted by pager at my home that morning by
24 an informant that I had worked with previously. The informant
25 told me that there was a yellow Nova parked in the 2000 block

1 and it showed as registered to Mr. Jaramillo.

2 Q All right. What did you do next?

3 A Agent Lasater had met me up there in the cemetery to
4 assist me in doing surveillance. I had also had conversation
5 with an individual by the name of Carl Frye, who works for the
6 Adult Probation and Parole Office. I spoke again with my
7 sergeant, Chris Zimmerman. And Sergeant Zimmerman met me up
8 at the cemetery where we were conducting the surveillance.

9 Q Did you see any people around the car at the time
10 that you arrived there?

11 A Not at the time that I arrived, no.

12 Q Was there anybody in the area at any time while you
13 were there?

14 A Yeah, there was a blue sedan that showed up that had
15 three individuals in it. And that car parked across the
16 street on the west side of Adams.

17 Q About what time did that occur?

18 A I would have to refer to my report to jog my memory
19 here.

20 Q Go ahead.

21 A That was approximately 11:40 a.m.

22 Q So you had been there a period of time over two
23 hours?

24 A Two and a half hours, yeah.

25 Q And the car had remained in that position during the

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A No.

Q Do you know how long he was in the house?

A About approximately 12:08 hours the blue sedan left after they went in the house. Arrived back, pulled back in front of the residence where the other three were at. And then the individual got out of the car and went into the house, and then returned back.

Q After he came back out of the house, the blue car and the other three individuals were still there, am I understanding that correctly?

A Correct.

Q Did you see him hand those individuals anything?

A No, I did not.

Q After he had been in the house, okay. Then ultimately the blue car drove away?

A That's correct.

Q Did you actually see that take place?

A I seen the blue car drive away. And then the Defendant walked across the street and got in the yellow Nova.

Q Get in the yellow car. At that point you no longer were involved in terms of assisting in the stop or any of that. That was handled by other officers?

A That's correct.

MR. CAINE: Thank you. That's all I have.

MS. SJOGREN: Nothing further.

1 A Yes, Ma'am.

2 Q Prior to two and a half years with the Strike Force,
3 how long were you with the Ogden City Police Department?

4 A Fifteen years, approximately.

5 Q Does that encompass your entire law enforcement
6 experience?

7 A 15 years with the police department, two and a half
8 years with Weber-Morgan Narcotics.

9 Q What training did you receive as a peace officer?

10 A We all receive training from the Peace Officers
11 Standards and Training at the Police Academy in Salt Lake.
12 That was about 16 years ago. I graduated number 1 in my
13 class. Since that time I have averaged probably over a
14 hundred to 150 hours of training every year in various
15 functions that I have served.

16 I have served 10 years in detectives and special
17 investigations. I have served on the SWAT Team, uniform
18 division, served as a supervisor in the uniform team, and
19 supervisor in the SWAT Force.

20 Q Have you received special training in investigating
21 drug crimes?

22 A Yes, I have. I have probably received in excess of
23 300 hours of special drug training on not just investigation
24 of drugs, but search warrants involving drugs, the Drug
25 Academy, supervision of Strike Forces and so forth.

1 exclusionary rule in place. Would you wait outside? Thank
2 you.

3 Q So you decided to get a search warrant for the
4 vehicle, is that correct?

5 A Yes, Ma'am.

6 Q What did you do in order to obtain a search warrant?

7 A I talked to Agent Ashment, got all the information
8 that he had obtained from his CI, put together the information
9 in a note form, went back to my office and got a lap top
10 computer, which we use to type the search warrant on, typed
11 the search warrant up, called Agent Ashment, went over the
12 search warrant with him, made sure everything was correct in
13 the search warrant. Noted in the search warrant I had learned
14 the information from Agent Ashment. And then I took it before
15 Judge Baldwin, I believe.

16 Q And did Judge Baldwin issue a search warrant?

17 A Yes, he did.

18 Q At approximately what time was that?

19 A It was signed by Judge Baldwin at approximately
20 11:00 hours, 11:00 a.m. in the morning.

21 Q All right. Then what did you do?

22 A After the search warrant was signed, I called some
23 people to help with the execution of it. I went downstairs
24 and packed up my things I had been working on. I called Agent
25 Ashment by telephone and advised him that the search warrant

1 behind and turned on his overhead red light.

2 Q And the vehicle then had gotten up to the stop sign.
3 Is that the Nova that we were discussing earlier?

4 A Yes, Ma'am.

5 Q All right. Go ahead.

6 A The driver of that vehicle immediately upon seeing
7 the light, put the vehicle in park and got out of the vehicle
8 while it was stopped in the roadway and walked back to Officer
9 Shorten's vehicle. Officer Shorten did a pat down search of
10 him for our safety. And while he was doing that, Agent
11 Ashment had gotten in the Nova and pulled it around the corner
12 off the street on to 20th Street so that it would not be
13 blocking traffic. I--that's when I talked to Mr. Jaramillo.

14 Q What were you talking to him about at that time?

15 A I had my back to the vehicle. When we do a search
16 warrant so often it is hard to find the drugs. To make it
17 easier, we will usually ask if they will tell us where they
18 are. So I asked Mr. Jaramillo, I said we had information that
19 there is drugs in the car and asked--and I said we have
20 information there is drugs in the car. And I asked if there
21 was. And he said probably. And I then asked where the drugs
22 were. And he kind of looked at me and said they have got
23 them, they have already got them.

24 Q What did you understand him to mean when he said
25 they have got them?

1 you see two of them at least in here today?

2 A Yes, I am.

3 Q Do you know if it was one of the officers present in
4 the courtroom that presented that to you?

5 A Yes, it was.

6 Q And which one was it?

7 A I think it was Sergeant Zimmerman who appeared.

8 Q Okay. And he is present in the courtroom today?

9 A He is.

10 Q Thank you. Do you have an independent recollection,
11 now that you have had a chance to look at the document, as to
12 what time you would have signed that document?

13 A I am sorry, I don't.

14 Q All right. And I have brought this matter to your
15 attention earlier, and--

16 A You did.

17 Q And you have had a chance to look at your court
18 calendar and other matters in an effort to try and refresh
19 your memory. Have you been able to do that?

20 A I have not. You know, I don't know any way to
21 determine that other than looking at the calendar and trying
22 to go from the calendar to see what particular cases I heard,
23 and see if any of them went through the lunch. I could not
24 determine that.

25 Q But having made that examination you are unable to

1 tell us from your recollection what time the warrant was
2 signed?

3 A That's correct. I could not tell you.

4 MR. CAINE: Thank you, Judge. That's all the
5 questions I have.

6 THE COURT: Ms. Sjogren.

7 MS. SJOGREN: Thank you, your Honor.

8 CROSS-EXAMINATION

9 BY MS. SJOGREN:

10 Q Judge Baldwin, if I told you that Officer Zimmerman
11 had written in his report concerning this search warrant that
12 you signed it at 1100 hours, which would be 11:00 a.m., would
13 you have any reason to dispute that?

14 A I would not have any reason to dispute that.

15 MS. SJOGREN: No further questions. Thank you.

16 MR. CAINE: That's all the questions I have.

17 THE COURT: Thank you, Judge Baldwin.

18 MR. CAINE: May this witness be excused?

19 THE COURT: He may.

20 MR. CAINE: Thank you, Judge, for coming down.

21 Do you want to go ahead then?

22 MS. SJOGREN: All right. Chris Zimmerman.

23 CHRIS ZIMMERMAN

24 called as a witness, and having been first duly sworn, was
25 examined and testified as follows:

1 Q On making that decision, as I understand it, you
2 went back to the police station here in this building? Or did
3 you go back to your offices?

4 A I ran to my office to get our laptop computer that
5 we type it on. Then I came to the station and typed it in the
6 detective office. Printed it and walked upstairs.

7 Q All right. During that time that it took you to go
8 to the Strike Force, get the laptop, come down here, type it,
9 before you went to see the Judge, which you have indicated was
10 about 11:00 o'clock, so roughly a period of two and a half
11 hours from the time you were at the cemetery, did you receive
12 any other information from any of the other officers who had
13 remained at the scene about the vehicle?

14 A It seems like Mike would call me every now and
15 again, update the fact that there was foot activity around the
16 vehicle.

17 Q But that it was not moving?

18 A It was not moving. And there was another vehicle
19 involved, but not this one.

20 Q So at least by, according to your report, by 11:00
21 o'clock, that vehicle had been at the location that you saw it
22 at about 8:30 in the morning for a period of two and a half
23 hours, and had not moved? At least that was the information
24 you had?

25 A That's what I thought.

1 which is located n the 8th floor of this building, is that
2 correct?

3 A Yes, sir.

4 Q And that you waited until such time as he took a
5 recess, and went into his chambers and presented Defendant's
6 Exhibit number 1 to him?

7 A Yes, sir.

8 Q All right. And based on your report, you say that
9 was at 11:00 a.m., is that right?

10 A Yes, sir.

11 Q Was anyone else with you, any of the other officers,
12 when this material was presented to the Judge?

13 A He didn't go upstairs with me, but Tony Fox was with
14 me, Agent Tony Fox was with me downstairs in the detective
15 division.

16 Q But he did not accompany you to Judge Baldwin's
17 chambers?

18 A Not that I can recall.

19 Q And would not have been there present when the
20 warrant was signed?

21 A Not--no.

22 Q Was anyone else present in the Judge's chambers
23 besides you and Judge Baldwin when the warrant was signed, do
24 you recall?

25 A No one was in the chambers. I think I talked to the

1 it was right around 8:00 o'clock, maybe 8:30.

2 Q And do you have a recollection of how long he
3 remained there before he left to get the search warrant?

4 A Ten or fifteen minutes.

5 Q After he left to get the search warrant, did you
6 have further contact with him?

7 A I did by way of telephone.

8 Q Did he later then return to the area?

9 A Yeah, he called me on the phone and asked me to meet
10 him in the vicinity of where the car was parked.

11 Q About what time was that?

12 A I believe that was about 12:00 o'clock.

13 Q At that time did he inform you that he had obtained
14 a search warrant?

15 A He told me he had a search warrant signed on the
16 phone prior to that.

17 Q Prior to that?

18 A (Nods head.)

19 Q Did you actually see the search warrant?

20 A I don't believe so.

21 Q Were you involved in the search of the vehicle?

22 A Yes, I was.

23 Q About what time did you actually search the vehicle?

24 A It was 12:17.

25 Q While you were at the scene between 8:00 and the

1 Q All right. And you are certain of that?

2 A Certain as I can be. I didn't make a notation of

3 the time that I was called.

4 Q That statement does not reside anywhere in your

5 report, does it?

6 A No, it doesn't.

7 Q In fact you didn't make any reference at all to the

8 warrant, except at the very end of your statement where you

9 indicate that the return was signed by Judge West and filed,

10 is that right?

11 A Yes.

12 Q Now you told us that you didn't actually see the

13 warrant, even when Detective Zimmerman came sometime before

14 12:17, is that right? He didn't show it to you?

15 A You know, now that I think about that a little bit,

16 there is a possibility that I read the warrant. But I just

17 can't--I can't be certain.

18 Q You can't say for sure, may have read it afterward?

19 A (Nods head.)

20 Q Obviously you saw the return?

21 A Yes.

22 Q Okay. But your testimony is you don't know if you

23 actually physically observed the warrant prior to the 12:17

24 search of that vehicle?

25 A That's right.

1 A Well, I mean the last name.

2 THE COURT: You want to know if you are pronouncing
3 the name correctly?

4 MR. CAINE: Jaramillo.

5 Q And you are pointing at the Defendant?

6 A Yes, Ma'am.

7 Q This is the same individual that you observed
8 walking between the vehicles?

9 A Yes, Ma'am.

10 Q All right. Were you involved in the search of the
11 vehicle after it was stopped?

12 A No, Ma'am, I was not.

13 Q Did you at any time see the search warrant?

14 A No, I did not.

15 Q Did you have any discussions with anybody about
16 whether or not a search warrant had been obtained?

17 A I was advised by Sergeant Zimmerman by our bug
18 channel, and this was prior to 12:08, that the search warrant
19 had been signed, and to notify them as to when the yellow Nova
20 leaves. And at approximately 12:08--the blue sedan had left
21 prior, had arrived back. The driver of that vehicle ran into
22 a house--I am sorry, I cannot pronounce the last name. I am
23 having a hard time with that. The suspect went in the house.
24 The driver of the blue sedan went into that house, came back
25 out. The suspect came out of the house and went directly to

1 Q All right. Now you indicated that--first of all you
2 have made a report of this, your report of what you did on
3 this particular incident?

4 A Yes, sir.

5 Q I have not seen that. Do you have it with you?
6 If I might approach so I could look at it just a minute.
7 Thank you.

8 A There is another portion to it. I might have
9 dropped it over there. There is another one. Let me go get
10 that for you.

11 Q Let me just identify this for the record. Is this
12 the other piece that goes with it?

13 A Yes, sir, Mr. caine, it is.

14 Q All right, thank you. If I may just have a moment.
15 Okay, I will return that to you.

16 Counsel asked you if you had ever seen the warrant which
17 was actually Defendant's Exhibit number 1 in this particular
18 hearing, if it was ever displayed to you or shown to you at
19 any time prior to the search. And I think your answer was no,
20 is that right?

21 A That's correct.

22 Q But you did indicate that you had some sort of
23 verbal notification of the existence of the warrant by
24 Detective Zimmerman at some point you said prior to 12:08, I
25 think?

1 their reports. You have got to make that decision.

2 And, of course, the person who signed it doesn't
3 remember. And the warrant on its face doesn't bear the time.

4 That's the issue. And I think if you resolve that
5 against us, then obviously everything else is moot. If you
6 resolve that in our favor, I think without question the facts
7 of this case do not fall within the parameters of the cases
8 cited which essentially say no harm, no foul. We could have
9 searched this anyway as an automobile search or probable cause
10 search. Given the facts of this case and what these officers
11 did in obtaining this warrant, I don't think any Court would
12 sustain it if in fact the warrant was not issued.

13 That's our position.

14 THE COURT: I am ready to make a ruling at this
15 point.

16 MR. CAINE: All right.

17 THE COURT: I do resolve those facts against your
18 side.

19 MR. CAINE: Okay.

20 THE COURT: After hearing the testimony given by the
21 agent-detectives that were involved in this case, it appears
22 believable to the Court that the reason Zimmerman left after
23 meeting with Ashment was to go and get a search warrant. And
24 that the time frame that he described is about how long it
25 would have taken him to prepare it and go get it signed.

1 And I think that it is also reasonable that what he did
2 then is returned, after obtaining that, to then participate in
3 the effecting of the search warrant. And again the tactical
4 decision to wait until somebody got in the vehicle and
5 participated in that. I believe from the testimony I have
6 heard that even though, as you point out, it was probably an
7 oversight it does not appear in the other reports--I am not
8 sure why that happened unless they were taking for granted
9 that Zimmerman's report itself would contain all the
10 information about what he did and the time he obtained the
11 warrant and how that was done.

12 But in any event, on the balance of the evidence
13 presented, I believe that the search warrant was obtained
14 prior to this stop, and prior to the search being effectuated.
15 And therefore I am going to deny your Motion to Suppress.

16 MR. CAINE: All right. Thank you.

17 THE COURT: Court will be in recess, and the
18 Defendant--

19 MR. CAINE: Might I have a minute with him before he
20 goes back, to discuss where we go from here?

21 THE COURT: You may.

22 MR. CAINE: Thank you, your Honor. I better also
23 return this. This was the document in which the search
24 warrant was, and put it in the file.

25 THE COURT: I will put the search warrant back in